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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DAVID EARL SCHILTZ, Defendant and Appellant.	D052453 (Super. Ct. No. SCD179922)

APPEAL from a judgment of the Superior Court of San Diego County, Peter C. Deddeh, Judge. Sentence vacated and remanded with directions.

David Earl Schiltz appeals a judgment following a remand for a retrial on strike allegations and resentencing. Schiltz contends the trial court erred in finding that his prior conviction from Nevada was a valid prison prior for purposes of enhancing his sentence, because Nevada and California require different elements for the crime of robbery, and the prosecution relied on evidence outside the record of conviction. We agree and reverse the judgment with directions.

FACTUAL AND PROCEDURAL BACKGROUND

A jury convicted Schiltz of receiving, withholding or concealing a stolen vehicle (Pen. Code, § 496d),[1] unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a)), and evading an officer with reckless driving (Veh. Code, § 2800.2, subd. (a)). In a bifurcated proceeding, the trial court found true the allegations that Schiltz had suffered three prior prison terms (§ 667.5, subd. (b)) and two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12). The prior strike convictions were based on a 1978 conviction in Riverside County, and a 1978 robbery conviction in Nevada.

In *People v. Schiltz* (May 1, 2007, D048214 [nonpub. opn.]) we reversed the true findings on the strike allegations. As to the strike allegation from Riverside County, we reversed because the People had not presented sufficient evidence to overcome Schiltz's *Boykin/Tahl*[2] challenge. Regarding the strike allegation based on the Nevada conviction, Schiltz argued, and the People conceded, that the California Supreme Court's ruling in *People v. Trujillo* (2006) 40 Cal.4th 165 (*Trujillo*), mandated "reversal of the true finding that his prior Nevada conviction qualified as a prior strike conviction." We reversed and ordered the issue remanded for retrial, but otherwise affirmed the judgment.

On retrial, the prosecutor admitted additional evidence regarding Schiltz's Riverside prior strike conviction to overcome his *Boykin/Tahl* challenge, but did not retry the Nevada prior conviction as a strike conviction. The trial court found the allegation of a prior strike conviction true as to the Riverside prior conviction. Schiltz then moved to

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

strike the true finding that the Nevada conviction constituted a prior conviction under California law. The court, based on its reading of our first opinion, denied the motion and later sentenced Schiltz to prison for eight years and four months. The sentence included four years for evading police, one year and four months for the vehicle theft, and one year for each of his three prior prison terms.

DISCUSSION

Schiltz contends that the trial court erred in considering his prior Nevada conviction a valid prison prior, because robbery under Nevada law does not require the same level of intent as California law. Schiltz asserts that the same reasoning regarding this court's reversal of the Nevada conviction as a strike conviction in his first appeal applies in assessing whether this conviction constitutes a valid prior conviction sentence enhancement. Specifically, he argues that the reasoning in *Trujillo, supra*, 40 Cal.4th 165, applies not only to the prosecution's case regarding the prior strike allegation, but also the prior conviction allegation. The People respond, arguing that Schiltz is barred from raising this claim by our prior opinion affirming that portion of his sentence.

I

OUR PRIOR OPINION DOES NOT BAR SHILTZ'S CLAIM

In the first appeal, our opinion explained the following disposition of the case:

> "The judgment of convictions and the true findings on the three prior prison terms allegations are affirmed. The court's true findings as to the two prior strike conviction allegations are reversed, and Schiltz's sentence is vacated. The matter is remanded for a new sentencing hearing, and any further proceedings not inconsistent with this opinion."

The People read this to mean that Schiltz may not assert a claim that the true finding on one of his three prior prison term allegations is invalid because we affirmed those findings on appeal. Schiltz, on the other hand, argues that because his sentence was vacated, he is placed in the same position as if he had never been sentenced. He also argues that the trial court's use of his Nevada conviction constitutes an "unauthorized sentence," and thus, can be reviewed whenever it comes to the trial or reviewing court's attention. We agree with Schiltz that a portion of his sentence constitutes an unauthorized sentence, and thus, is not waived or barred.

Under the general rule, only properly raised and preserved claims are reviewable on appeal. (*People v. Smith* (2001) 24 Cal.4th 849, 852 (*Smith*); *People v. Scott* (1994) 9 Cal.4th 331, 354.) This rule works proactively " 'to reduce the number of errors committed in the first instance' [citation], and 'the number of costly appeals brought on that basis.' [Citation]" (*Smith, supra,* 24 Cal.4th at p. 852.) In the sentencing context for example, claims involving the discretion of the trial court, raised for the first time on appeal, are considered waived. (*Scott, supra,* 9 Cal.4th at p. 353.)

With sentencing errors, a narrow exception exists to the waiver rule for " ' "unauthorized sentences" or sentences entered in "excess of jurisdiction." ' " (*Smith, supra,* 24 Cal.4th at p. 852, quoting *People v. Welch* (1993) 5 Cal.4th 228, 235.) "Because these sentences 'could not lawfully be imposed under any circumstances in the particular case' [citation], they are reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court.' [Citation.]" (*Smith, supra,* 24 Cal.4th at p. 852.) Clear legal errors at sentencing that can be addressed without

reference to factual findings in the record are "subject to judicial correction whenever the error comes to the attention of the reviewing court." (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.)

Schiltz's claim that this court's reversal of the true finding as to his prior conviction in Nevada as a strike prior also invalidates its use as a prison prior enhancement presents a pure question of law. Specifically, whether the holding and reasoning in *Trujillo, supra,* 40 Cal.4th 165, applies to his prior conviction enhancement based on the Nevada robbery conviction. Because, as we shall explain, we agree that the Nevada conviction should be stricken, the imposition of the sentencing enhancement amounts to an unauthorized sentence and may be reviewed here.

II

THE NEVADA PRISON PRIOR SHOULD BE STRICKEN

Schiltz argues that the reasoning and holding in *Trujillo, supra,* 40 Cal.4th 165, should apply equally to an enhancement under section 667.5, as it does under section 667. The People's brief does not discuss this contention, concentrating instead on the waiver issue. We agree with Schiltz that the holding in *Trujillo* applies to this case, and where the evidence failed to show Schiltz had the requisite level of intent for robbery in California, the Nevada conviction cannot be used as a prior conviction enhancement to his sentence.

In his first appeal, Schiltz challenged the use of his 1978 robbery conviction in Nevada as a prior strike conviction. Schiltz argued that because California requires specific intent as an element for robbery and Nevada does not, California statutory law

requires that the prosecution prove he had the requisite intent. Under section 667, a violent or serious prior felony conviction may include:

> "A conviction in another jurisdiction for an offense that, if committed in California, is punishable by imprisonment in the state prison. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense that includes all of the elements of the particular felony as defined [under California law]." (§ 667, subd. (d)(2).)

To prove a crime from another jurisdiction included the same elements as the crime in California, the prosecutor may only look to the record of conviction. (*Trujillo, supra,* 40 Cal.4th at p. 177.)

Although both California and Nevada require intent as an element to the crime of robbery, the level of intent differs. (*People v. McGee* (2006) 38 Cal.4th 682, 688.) In California, robbery is a specific intent crime (see § 211; *McGee, supra,* 38 Cal.4th at p. 688); on the other hand, robbery under Nevada law requires only general intent (see Nev. Rev. Stat. § 200.380; *Hickson v. State* (1982) 98 Nev. 78, 79-80 [640 P.2d 921, 921-922]). Thus, the prosecutor had to prove that Schiltz had the specific intent required in California during the Nevada robbery based on the record of conviction. To do so, the prosecution apparently relied on certain statements in Schiltz's postconviction probation report, which the California Supreme Court found impermissible in *Trujillo*. There, the court found that "[a] statement by the defendant recounted in a postconviction probation officer's report does not necessarily reflect the nature of the crime of which the defendant was convicted [and] cannot be used to prove that the prior conviction was for a serious felony." (*Trujillo, supra,* 40 Cal.4th at p. 179.) In light of that ruling, we reversed the

true finding that the Nevada conviction qualified as a strike conviction in Schiltz's first appeal.

Now, Schiltz argues that the Nevada conviction cannot qualify as a prior conviction, because section 667.5 requires the same elements-based analysis in assessing out-of-state prior convictions. Under section 667.5:

> "A prior conviction of a felony shall include a conviction in another jurisdiction for an offense which, if committed in California, is punishable by imprisonment in the state prison if the defendant served one year or more in prison for the offense in the other jurisdiction. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense which includes all of the elements of the particular felony as defined under California law if the defendant served one year or more in prison for the offense in the other jurisdiction." (§ 667.5, subd. (f).)

Thus, the burden imposed on the prosecution in seeking a prior conviction enhancement is the same as imposed under section 667, with the exception that under section 667 the felony must be a serious felony.

To prove that the elements exist, the prosecution is similarly limited to the record of conviction, which does not include statements by the defendant in a postconviction probation report. (*Trujillo*, *supra*, 40 Cal.4th at p. 179.) The court in *Trujillo* found that such evidence does not fall under the record of conviction because statements made postconviction do not necessarily reflect the nature of the crime or the facts upon which the person was convicted. (*Id.* at p. 180.) The court also expressed concern that such statements could create "harm akin to double jeopardy and forc[e] the defendant to relitigate the circumstances of the crime." (*Ibid.*)

We conclude the reasoning in *Trujillo, supra,* 40 Cal.4th 165, should apply to prior out-of-state felony convictions, just as it applies to prior out-of-state strike convictions for enhancement purposes. The prosecution faces essentially the same burden in seeking enhancements based on out-of-state convictions under sections 667 and 667.5. To meet this statutory burden, the prosecution may only rely on the record of conviction, which excludes postconviction statements from a probation report. Where the Nevada conviction failed as a strike conviction, it necessarily fails as a prior felony conviction for sentence enhancement purposes. The postconviction statements in the Nevada probation report are not included in the record of conviction, and therefore, cannot be used to prove Schiltz had specific intent in the Nevada robbery. The trial court's imposition of a prior conviction enhancement based on the 1978 Nevada robbery conviction is an unauthorized sentence, and must be stricken.

DISPOSITION

The sentence is vacated and the case is remanded with directions to strike the prior prison term enhancement based on Schiltz's 1978 Nevada robbery conviction. The trial court is further directed to adjust Schiltz's sentence, accordingly, to seven years and four months, prepare an amended abstract of judgment, and forward a copy of the amended

abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.